APPENDIX A — UNPUBLISHED PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT FILED NOVEMBER 12, 1997

UNPUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 97-1208

NEWCO, INCORPORATED,

Plaintiff-Appellant,

v.

CESSNA AIRCRAFT COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the District of Maryland, at Greenbelt.
Alexander Williams, Jr., District Judge.
(CA-96-2896-AW)

Argued: September 29, 1997

Decided: November 12, 1997

Before WILKINS, Circuit Judge, PHILLIPS, Senior Circuit Judge, and THORNBURG, United States District Judge for the Western District of North Carolina, sitting by designation.

Affirmed by unpublished per curiam opinion.

Appendix A

* * *

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Newco, Incorporated appeals an order of the district court dismissing its action against Cessna Aircraft Company for failure to state a claim upon which relief could be granted. *See* Fed. R. Civ. P. 12(b)(6). Finding no error, we affirm.

I.

The relevant allegations in Newco's complaint are as follows.[1] Cessna and Newco entered into a written contract for Cessna to sell to "Purchaser" an airplane for $6,295,000, payable in several installments. J.A. 8 (internal quotation marks omitted). Newco's president, Thomas L. Blair, advised Cessna's sales representative, Michael Dwyer, that Newco wanted the unlimited right to assign the contract to a third party. Dwyer represented that such an assignment would be permitted and demonstrated this understanding by handwriting the definition of "Purchaser" in the contract as "Newco, Inc. *or assignee*." *Id.* (emphasis added; internal quotation marks omitted). The contract also stated, however, that the "Agreement, including the rights of Purchaser

1. In reviewing a motion to dismiss for failure to state a claim, we consider well-pled allegations in the complaint as true and construe those allegations in favor of the plaintiff. *See Martin Marietta Corp. v. International Telecomms. Satellite Org.*, 991 F.2d 94, 97 (4th Cir. 1992).

hereunder, may not be assigned by Purchaser except to a wholly-owned subsidiary or successor in interest by name change or otherwise and then only upon the prior written consent of Seller." J.A. 9 (emphasis and internal quotation marks omitted).

When Newco's second installment payment became due, Newco informed Cessna that the payment would not be made until Cessna verified that Newco had an unrestricted right to assign the contract and that until such verification Newco was placing the scheduled installment payments in a segregated account. Cessna refused to accede to Newco's position and ultimately declared Newco to be in default.

Newco subsequently filed this action, alleging that Cessna had repudiated the contract by failing to respond to Newco's request for adequate assurances made in accordance with the provisions of the Kansas Commercial Code. Newco also alleged that Cessna had negligently misrepresented that Newco had an unrestricted right to assign the contract.

The district court held that Newco had failed to state a claim for anticipatory repudiation, reasoning that because the contract unambiguously provided that Newco's assignability rights were not unrestricted, Newco had no reasonable grounds for insecurity and Cessna had no duty to provide Newco with adequate assurance that it would perform.[2] With regard to the

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2. The parties agree that Kansas law governs the contract issues in this case and that Maryland law applies to the negligent misrepresentation issue. Under Kansas law, "When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return." Kan. Stat. Ann. § 84-2-609(1) (1996).

negligent misrepresentation claim, the district court held that Newco had failed to state a claim because it had not alleged facts that would give rise to a duty on the part of Cessna not to make negligent misrepresentations.

II.

Newco argues that the district court erred in concluding that the contract was unambiguous, in failing to apply several rules of contract construction, and in refusing to consider extrinsic evidence. We disagree.

In Kansas, "[t]he intent of the parties is determined from the four corners of an unambiguous instrument, harmonizing the language therein if possible." *Hall v. JFW, Inc.*, 893 P.2d 837, 840 (Kan. Ct. App. 1995). When "the provisions of a written instrument are clear and unambiguous, there is no occasion for applying rules of construction." *Desbien v. Penokee Farmers Union Coop. Ass'n*, 552 P.2d 917, 922 (Kan. 1976). Similarly, extrinsic evidence cannot be used to contradict or to construe an unambiguous agreement. *See TMG Life Ins. Co. v. Ashner*, 898 P.2d 1145, 1154 (Kan. Ct. App. 1995). "Ambiguity in a written contract does not appear until the application of pertinent rules of interpretation to the face of the instrument leaves it generally uncertain which one of two or more meanings is the proper meaning." *Simon v. National Farmers Org., Inc.*, 829 P.2d 884, 888 (Kan. 1992). We review the dismissal of a complaint for failure to state a claim de novo. *See Mylan Lab., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993).

Here, although the definition of "Purchaser" as "Newco, Inc. or assignee" clearly reflects that the parties contemplated that Newco might assign its rights, nothing in that definition

indicates an intention to grant Newco an unrestricted right of assignment. Therefore, in light of the specific contractual language restricting Newco's assignment rights, the district court was correct not to employ rules of construction or consider extrinsic evidence to resolve an ambiguity that did not exist.

Because Newco's insecurity was based on an unreasonable interpretation of the contract, Newco had no right to suspend its own performance. Accordingly, Cessna's declaration of default was within its rights, and the district court correctly dismissed Newco's claim for anticipatory repudiation.

III.

Newco next argues that the district court erred in dismissing the negligent misrepresentation claim on the basis that Newco had failed to allege facts that would give rise to a duty on the part of Cessna not to make negligent misrepresentations to Newco. We affirm, but on a basis different from the one offered by the district court. *See United States v. Dorsey*, 45 F.3d 809, 814 (4th Cir. 1995) (holding that "an appellate court can affirm a trial court's opinion on different grounds than those employed by the trial court").

Under Maryland law, an action for negligent misrepresentation will lie only when the following five criteria are met:

> (1) the defendant, owing a duty of care to the plaintiff, negligently asserts a false statement;
>
> (2) the defendant intends that his statement will be acted upon by the plaintiff;

(3) the defendant has knowledge that the plaintiff will probably rely on the statement, which, if erroneous, will cause loss or injury;

(4) the plaintiff, justifiably, takes action in reliance on the statement; and

(5) the plaintiff suffers damage proximately caused by the defendant's negligence.

Martens Chevrolet, Inc. v. Seney, 439 A.2d 534, 539 (Md. 1982).

Here, because Cessna's representation that Newco had an unrestricted right to assign the contract was directly contradicted by specific language in the contract itself, Newco's reliance on Cessna's representation was unjustifiable as a matter of law. *See Foremost Guar. Corp. v. Meritor Sav. Bank*, 910 F.2d 118, 126 (4th Cir. 1990) (holding that under Maryland law, "one may not reasonably rely upon an oral statement when he has in his possession a contrary statement in writing"); *Call Carl, Inc. v. BP Oil Corp.*, 554 F.2d 623, 631 (4th Cir. 1977) (explaining that under Maryland law, a person cannot "reasonably [rely] upon . . . statements made in the face of plainly contradictory contractual language"); *James v. Goldberg*, 261 A.2d 753, 758 (Md. 1970) (ruling that a plaintiff had no right to rely upon allegedly false oral statements that contradicted a written agreement between the parties). The district court therefore correctly dismissed Newco's claim for negligent misrepresentation.

IV.

For the foregoing reasons, we affirm the dismissal by the district court of Newco's complaint for failure to state a claim.

AFFIRMED

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, SOUTHERN DIVISION, GRANTING CESSNA'S MOTION TO DISMISS AND DENYING NEWCO'S MOTION FOR PARTIAL SUMMARY JUDGMENT FILED JANUARY 30, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. AW-96-2896

NEWCO, INC.,

Plaintiff,

v.

THE CESSNA AIRCRAFT COMPANY

Defendant.

ORDER

This case came before the Court on Defendant's Motion To Dismiss and Plaintiff's Motion for Partial Summary Judgment. Both parties have filed Responses and Replies.

The Court held a hearing on January 27, 1997. After considering the entire file and listening carefully to the oral arguments presented at the hearing, the Court believes that Defendant's Motion to Dismiss must be granted.

First, the Court finds that the language of the contract in this case is not susceptible to two different meanings with regard

to whether Plaintiff had an unrestricted right of assignment. The contract clearly provides that "[t]his [a]greement, including the rights of [p]urchaser hereunder, may not be assigned by [p]urchaser except to a wholly-owned subsidiary or successor in interest by name change or otherwise and then only upon the prior written consent of [s]eller." This language can be read in harmony with the words "Newco, Inc. or assignee", which were written in the contract's preamble to define "purchaser." The Court does not believe that the presence of those words in the preamble operate to make the plain and straightforward language of the contract ambiguous. As a result, Plaintiff did not have an unrestricted right of assignment under the contract.

Second, the Court believes that Plaintiff's claim for negligent misrepresentation must be dismissed because Plaintiff and Defendant's relationship was solely contractural. Additionally, Plaintiff has failed to allege a tort duty of care owed to it by Defendant. Also, Plaintiff has not averred a "special relationship" between it and Defendant.

For the reasons set forth above and on the record, it is this 27th day of January, 1997 ORDERED

1. That Defendant's Motion To Dismiss as to Counts I and II of Plaintiff's Verified Complaint BE, and the same hereby IS, **GRANTED**; and

2. That Plaintiff's Motion for partial Summary Judgment on the issue of liability BE, and the same hereby IS, **DENIED**; and

3. That Defendant's Motion to Dismiss its Counterclaim under Fed. R. Civ. P. 41(c), without prejudice, BE, and the same hereby is **GRANTED**; and

Appendix B

4. That this Case is **CLOSED**; and

5. That the Clerk of the Court mail copies of this Order to all counsel of record.

s/ Alexander Williams, Jr.
Alexander Williams, Jr.
United States District Court Judge

APPENDIX C — ORAL OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, SOUTHERN DIVISION, GRANTING CESSNA'S MOTION TO DISMISS AND DENYING NEWCO'S MOTION FOR PARTIAL SUMMARY JUDGMENT DELIVERED ON JANUARY 27, 1997

* * *

[34] there was a contract and whether there was a breach of contract, then it will be important for us. If the Court finds that the contract is not ambiguous and as a matter of law that the complaint should be dismissed, then our understanding as a practical effect is there would be no challenge. We would be entitled to the $125,000 as a matter of law. Did I clarify or confuse?

THE COURT: Well, I'm not sure I agree with that. Well, let me make my ruling here. You can react to that.

Let me say this. I've had this case several months and I have observed the pleadings and discovery that has piled up in this case. As both of you recall or both sides recall, I had a hearing in my chambers when the case first was filed on a TRO and at the time, because I felt that irreparable harm wasn't there, that the aircraft had already been sold and the possibility of an adequate remedy at law by way of damages was available I denied the temporary restraining order. I believe that there was a preliminary injunction hearing requested but later recalled by the plaintiff or both sides or some notice came to chambers that you were moving ahead with some discovery.

I have before me two motions. One is a motion to dismiss filed by the defendant, the manufacturer of the aircraft, essentially saying that the two claims, that is, the anticipatory

breach and the negligent misrepresentation, just [35] cannot be established or made out. The plaintiff in this case opposes that and, in addition to opposing that motion to dismiss, has filed their own motion for summary judgment not only on the liability question of the main claim but also on the counterclaim which has been filed by the defendant. That's why I was trying to get some information as to the nature just to the counterclaim.

Now, stripped to the bare bones, this case really is about the construction of what we call a purchase agreement. I've looked at this thing over and over again trying to make some sense of it. As I initially said when I came on the bench, when the handwritten words "or assignee" was placed in, my initial reaction was that's just confusion. We are adding things that we don't need to, particularly when you have Section IV, subparagraph 6, which says, "This agreement is wholly integrated and is the sole agreement controlling the purchase and sale and is exclusive of any other express, implied, verbal, or written representations, or omissions or agreements, and is binding on the Purchase and Seller, their heirs, executors, administrators, successors or assigns. This agreement, including the rights of Purchaser hereunder, may not be assigned by Purchaser except to a wholly-owned subsidiary or successor-in-interest by name change or otherwise and then only upon the prior written consent of Seller."

Now, I think that courts ought to take what I've always [36] considered to be a functional approach in statutory interpretation. What that means to me is that we look at the entire writing and we make every effort to see if we can harmonize it or read it together so that it will flow with some kind of common sense as to what they were attempting to say.

Appendix C

After listening to both sides argue here today, I just feel, Mr. Mott, that the kind of interpretation you want me to put on this agreement is not reasonable. It is unreasonable. It's stretching it. An I tend to think that the placing in handwriting the words "or assignee" just before the parenthesis "purchaser" is to be read and explained and defined consistent with Section IV, paragraph 6. In other words, paragraph 6 of Section IV clearly defines what is meant by an assignee. It says essentially a wholly — let me get the words right — "except to a wholly-owned subsidiary or successor-in-interest by name change or otherwise, and then only upon the written consent of the Seller."

I am finding today that there's nothing inconsistent about that paragraph as well as the preliminary or preface paragraph that simply hand-writes the word "assignee." I think that's the only way to read it. To stretch that meaning to suggest that the word "purchaser" includes Newco or an assignee and then there has to be another assessment of an assignment, in other words, permitting two assignments, to me is just stretching it too [37] far. It's an unreasonable interpretation of that contract and I just don't think that I should reach that conclusion. I think a reasonable functional approach is what I have to be guided by and that's what I will do.

Now, when inquiry was made about the balance that was due — not the balance due but the second deposit that was due or the installment that was due and wasn't paid, to me is a breach on behalf of the plaintiff. Plaintiff wants to say that they were willing to pay the $250,000 but not by Newco, the plaintiff, but by some assignee that did not meet the definition of the paragraph. I agree with Mr. Lynch that failing to abide or agree to an unreasonable interpretation of a contract is not an anticipatory breach. There was no anticipatory breach here. The

defendant had every right to insist that the assignment be in compliance with the agreement as set forth.

So, the whole dispute and controversy here really surrounds the interpretation of that paragraph and I believe that a reasonable interpretation is to find that they mean exactly the same thing and that there's a characterization and a category and a description for an "assignee."

So, claim number one, anticipatory breach, cannot be established. It's just not there. I agree that under no stretch of the imagination can you find anticipatory breach on these facts and I have to grant the defendant's motion for dismissal of that particular claim.

[38] With reference to the negligent misrepresentation, as I indicated before, Judge Garbis of the court as well as several other judges of this court as well as myself in several opinions that I have issued clearly subscribe to the view that under the Maryland law if the relationship is no more than a contractual one, then no special tort obligation can flow therefrom.

In this particular case it seems to me that the relationship is no more than contractural. There's no special relationship, no special nexus between the parties. I have read this case. I sat here and read this Lubore v. RPM Associates, Mr. Mott, that you just gave me. This case also cites the same rule I have just given you. It says here, "In an arm's length commercial transaction involving only economic loss, the duty of care for the tort of negligent misrepresentation may arise out of a special relationship or intimate nexus." This case goes on to tell us about two high level executives, one of which knew that the other had to get accurate information, otherwise they would

suffer significant economic harm. The court looked at the allegations and the pleadings and found that the allegations were such that it suggested a special relationship and a special nexus between the parties.

We don't have that in this case. It's just not there. This case is very consistent with the Garbis decision as well as the clear Maryland law on that point. So, with reference to the second claim the Court also will grant the motion to dismiss as [39] to the claim of negligent misrepresentation.

Now, conversely, Mr. Mott, having held the way I have held, obviously I must deny your motion for summary judgment as to the question of liability on your claim and I also must deny partial liability on the counterclaim that you have requested in your motion. So, I deny two facets of your motion for partial summary judgment.

Now, that's really all that's before me today. Where are we on the counterclaim?

MR. VENTKER: Your Honor, given those rulings, absent objection by Mr. Mott, under Rule 41 I'll move to dismiss our counterclaim at this time.

THE COURT: Under 41, a voluntary dismissal?

MR. VENTKER: Yes, sir.

THE COURT: All right. What's your position on that, counsel?

MR. MOTT: Well, Your Honor, that's fine.

THE COURT: All right.

MR. MOTT: Your Honor, if I could, I would make two items for the record.

THE COURT: Yes.

MR. MOTT: I wasn't sure how the process would work, Your Honor, in terms of — there was my summary and whether I had a reply. The only two points I would make, Your Honor, is that in discovery — I'm trying to create a record on appeal.

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APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING NEWCO INC.'S PETITION FOR REHEARING FILED DECEMBER 8, 1997

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-1208
CA-96-2896-AW

NEWCO, INCORPORATED

Plaintiff-Appellant

v.

CESSNA AIRCRAFT COMPANY

Defendant-Appellee

On Petition for Rehearing with
Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Appendix D

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX E — CONTRACT OF PURCHASE BETWEEN NEWCO, INC. AND THE CESSNA AIRCRAFT COMPANY DATED AUGUST 30, 1994

CITATION EXCEL PURCHASE AGREEMENT No. CJ-XL *0294*

This CITATION EXCEL PURCHASE AGREEMENT ("Agreement" is made and entered into on this *30* day of *August* by and between The Cessna Aircraft Company ("Seller") with a principal place of business at 1 Cessna Boulevard, Wichita, Kansas 67215 and *Newco, Inc. or assignee* ("Purchaser") with a principal place of business at *One Bank Street 3rd Floor Gaithersburg MD 20878*, for the sale of a Cessna CITATION EXCEL Model 560-XL aircraft (herein referred to as "Aircraft") as described in the Specification and Description dated *TBF* ("Specification"), a copy of which will be furnished hereto as Exhibit "A" as soon as available and incorporated herein by reference and made a part hereof, it is understood and agreed between the Seller and Purchaser that the Specification dated *TBF* added hereto as Exhibit A is preliminary in content and is subject to revision by the Seller upon development of final data for the Cessna CITATION EXCEL. Upon development of such final data for the Final Specification and Description ("Final Specification") for incorporation herein by reference, the same shall be deemed to supersede and replace said preliminary Specification. All other exhibits referred to in this Agreement are also hereby incorporated by reference herein.

The parties agree that the Purchaser shall pay Seller the Price, as hereinafter defined, for the Aircraft and Seller shall transfer good and clear title to the Aircraft to Purchaser under the following mutually agreed to terms and conditions:

1. BASE PRICE: The Base Price of the Aircraft is *$6,295,000*

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Note: The Base Price shall be adjusted by the percentage difference in the Consumer Price Index, Urban Wage Earners and Clerical Workers (CPI-W) 1982–1984 = 100 as published by the U.S. Department of Labor, Bureau of labor Statistics, for the month of September 1994 and the month of November *1997*.

2. OPTIONAL EQUIPMENT AND MISCELLANEOUS CHARGES; The Option Price Listed dated *TBF* is effective for aircraft delivering in 1997/1998:

Optional Equipment to be Selected by Purchaser nine (9) months prior to Preliminary Delivery Date.

Optional Equipment and Miscellaneous Charges	$ TBF
TOTAL PURCHASE PRICE:	$ TBF

3. PAYMENT TERMS:

a. Initial Deposit	$125,000
b. Second Deposit due twenty-four (24) months prior to Preliminary Delivery Date	$250,000
c. Third Deposit due twelve (12) months prior to Preliminary Delivery Date	$250,000
d. Fourth Deposit due six (6) months prior to Preliminary Delivery Date	$250,000
e. Balance due upon Aircraft Delivery	$ TBF

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4. PRELIMINARY DELIVERY DATE: Preliminary Delivery Date F.O.B. Wichita, Kansas is ~~*TBF*~~ [*2CD QUARTER, 1998*]

5. SCHEDULED DELIVERY DATE: Scheduled Delivery Date will be established by Seller 180 days prior to the Preliminary Delivery Date and notification thereof will be furnished to Purchaser.

6. ORDER DUE DATE: *TBF*

7. SPECIAL CONDITIONS: Due to the time span between the date of this Purchase Agreement and the Scheduled Delivery Date of the Aircraft, Seller reserves the right to revise the Specification whenever occasioned by product improvements, U.S. Government regulations, or other good manufacturing and/or vendor cause as long as such revisions do not result in a reduction in guaranteed Aircraft performance standards, as defined in the Specification. Seller shall notify Purchaser of any such revisions.

8. TRADE-IN AGREEMENT: A Trade-In Agreement *is not* part of this Agreement. **(Circle and initial one).**

9. LIMITED WARRANTY: The Price includes a Cessna Limited Warranty as defined in Exhibit A. EXCEPT FOR THE EXPRESS TERMS OF SELLER'S WRITTEN LIMITED WARRANTIES PERTAINING TO THE AIRCRAFT, WHICH ARE SET FORTH IN THE SPECIFICATION (EXHIBIT A), SELLER MAKES NO REPRESENTATIONS OR WARRANTIES EXPRESS OR IMPLIED, OF MERCHANTABILITY, OR FITNESS FOR ANY PARTICULAR PURPOSE, OR OTHERWISE WHICH EXTEND BEYOND THE FACE HEREOF OR

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THEREOF, SELLER SPECIFICALLY EXCLUDES AND DISCLAIMS ANY AND ALL REPRESENTATIONS AND/OR WARRANTIES NOT INCLUDED WITHIN THE FOUR CORNERS OF THIS AGREEMENT. THE WRITTEN LIMITED WARRANTIES OF SELLER ACCOMPANYING ITS PRODUCT ARE IN LIEU OF ANY OTHER OBLIGATION OR LIABILITY WHATSOEVER BY REASON OF THE MANUFACTURE, SALE, LEASE, OR USE OF THE WARRANTED PRODUCTS AND NO PERSON OR ENTITY IS AUTHORIZED TO MAKE ANY REPRESENTATIONS OR WARRANTIES OR TO ASSUME ANY OBLIGATIONS ON BEHALF OF SELLER. THE REMEDIES OF REPAIR OR REPLACEMENT SET FORTH IN SELLER'S WRITTEN LIMITED WARRANTIES ARE THE ONLY REMEDIES UNDER SUCH WARRANTIES OR THIS AGREEMENT. IN NO EVENT SHALL SELLER BE LIABLE TO PURCHASER OR ANY THIRD PARTY FOR ANY INCIDENTAL OR CONSEQUENTIAL DAMAGES, INCLUDING, WITHOUT LIMITATION, LOSS OF PROFITS OR GOODWILL, LOSS OF USE, LOSS OF TIME, INCONVENIENCE, OR COMMERCIAL LOSS. THE ENGINES AND ENGINE ACCESSORIES ARE SEPARATELY WARRANTED BY THEIR MANUFACTURER AND ARE EXPRESSLY EXCLUDED FROM THE LIMITED WARRANTIES OF SELLER. THE LAWS OF SOME STATES DO NOT PERMIT CERTAIN LIMITATIONS ON WARRANTIES OR REMEDIES. IN THE EVENT SUCH A LAW APPLIES, THE FOREGOING EXCLUSIONS AND LIMITATIONS ARE AMENDED INSOFAR AND ONLY INSOFAR AS REQUIRED BY SAID LAW.

Appendix E

SECTION I — Prices and Payments

1. The price of the Aircraft hereby purchased and sold and other applicable charges are set forth on page 1 hereof and include CITATION EXCEL Standard Equipment, optional equipment selected by Purchaser as listed in Item 2, technical and service publications, computerized Maintenance Record Service (CESCOM) for a period of (1) year, and training for pilot and maintenance personnel in accordance with the CITATION EXCEL Crew Training Agreement as set forth in the Specification (Exhibit A). The price is subject to adjustment for the additional payments, if any, to be made by Purchaser as set forth in Section III, Clauses 2 and 3 below.

2. All payments shall be made in United States dollars at Wichita, Kansas, U.S.A., and shall be made by certified check, bank cashier's check, wire transfer or such other negotiable instruments as may be acceptable to Seller.

SECTION II — Seller Agrees

1. To provide the Aircraft to Purchaser in accordance with the Specification and Description (Exhibit A) as modified in writing by mutual agreement of the parties. In the event of conflict, the terms and conditions of this Agreement exclusive of Exhibit A take precedence over terms and conditions expressed in Exhibit A.

2. To notify Purchaser of the Scheduled Delivery Date at least six (6) months prior to the Preliminary Delivery Date, and to confirm or adjust the date at least 30 days prior to the Scheduled Delivery Date by notifying Purchaser of the day the Aircraft will be ready for delivery.

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3. To furnish to Purchaser at the time of delivery of the Aircraft a Bill of Sale on the appropriate Federal Aviation Administration from transferring ownership to the Aircraft to the Purchaser free and clear of all encumbrances, unless otherwise agreed to by the parties.

SECTION III — Purchaser Agrees

1. Except as set forth in Section IV, Clause 3, all deposits shall be retained by Seller not as a forfeiture but as liquidated damages for default if this Agreement is breached, cancelled, or terminated by Purchaser for any cause whatsoever, whereuopn this Agreement shall end. Purchaser's failure to timely pay any deposits, the balance due on the Aircraft, or any other changes under this Agreement when due, shall constitute a breach of this Agreement. Retention of Purchaser's deposits shall be Seller's sole remedy for Purchaser's default.

2. Any changes or addition requested after the Order Due Date shall be subject to additional charges and approval by Seller. Should any changes or additions delay the delivery of the Aircraft, Seller shall be authorized to adjust the Scheduled Delivery Date upon written notice to Purchaser. Purchaser agrees Seller shall appoint the Aircraft in Seller's demonstration aircraft configuration, as detailed in Exhibit A-1, which will be furnished to Purchaser at least 30 days prior to order Due Date, if Purchaser fails to submit an order for optional equipment and interior and exterior selections by the Order Due Date.

3. To pay for (i) additional or substituted optional equipment order by Purchaser pursuant to Paragraph 2 immediately above; (ii) Seller's charges, if any, for charges or additions requested by Purchaser; (iii) any national, state, or

local taxes other than taxes on income applicable to this sale or transaction whether imposed on either Purchaser or Seller (whether imposed at the time of delivery and sale or thereafter); (iv) transportation charges for delivery if other than at Wichita, Kansas; (v) any import duties, import taxes, or other import charges imposed by other than the United States Government; and (vi) any other applicable charges.

4. Within seven (7) days after the Scheduled Delivery Date, to inspect, flight test, and accept delivery of the Aircraft at Wichita, Kansas, and to pay Seller the balance due on the Aircraft and all other charges due under this Agreement (less appropriate credit for trade-in aircraft where applicable). In all events, the full balance due on the Aircraft and all other charges shall be paid no later than seven (7) days following the Scheduled Delivery Date or upon delivery of the Aircraft, whichever first occurs. If any charges are not known at the time, the same shall be paid immediately upon advice.

5. To pay Kansas State Sales Tax or to execute a Kansas State Sales Tax Exemption Certificate.

SECTION IV — General Terms

1. Prior to acceptance by Purchaser, the Aircraft shall be subject to inspection and a flight test of not more than two (2) hours' duration controlled by Seller and participated in by not more than (2) of Purchaser's representatives. Seller shall have a reasonable time to correct any discrepancies disclosed by such flight test and, if necessary, the Scheduled Delivery Date will be adjusted accordingly. Acceptance of the Aircraft, as evidenced by receipt acknowledging delivery, shall constitute Purchaser's agreement that the Aircraft conforms to the specifications,

standards, and other requirements of this Agreement or is otherwise acceptable to Purchaser.

2. Risk of loss shall pass from Seller to Purchaser upon execution of receipt acknowledging delivery of the Aircraft.

3. Seller shall not be liable to Purchaser for any delay in making delivery for any cause whatsoever, provided, however, if Seller should fail to make delivery within ninety (90) days after the Scheduled or Rescheduled Delivery Date and such failure is not due to fire, flood, strikes, or other industrial disturbances, accident, war, riot, insurrection, delay in vendor deliveries, market conditions, or other causes beyond the control of the Seller, or if for any reason Seller should fail to make delivery within one hundred (180) days after the Scheduled Delivery Date, Purchaser shall have the right to demand return of all deposits plus interest, unless Purchaser agrees to a later Scheduled Delivery Date. If Purchaser makes such a demand, interest on returned deposits shall be computed from the date of receipt of the respective deposits by Seller to the date Seller forwards the refund to Purchaser, at the prime rates in effect from time to time at Chase Manhattan Bank, New York, New York. Upon return of deposits plus interest, this Agreement shall end. Purchaser agrees that its sole remedy for any failure of Seller to perform any part of this Agreement is limited to the return of deposits plus interest.

4. CESCOM reports will be furnished Purchaser at no additional charge for one (1) year from date of delivery provided Purchaser furnishes Seller the required data and information. CESCOM does not replace Purchaser's obligation to comply with applicable governmental regulations as to maintenance, repair, and operation of the Aircraft. CESCOM reports to be

furnished by Seller will be based on information furnished by Purchaser and other owners of CITATION EXCEL aircraft. Seller shall have no liability because of any errors in or omissions from such CESCOM reports.

5. Any notices given pursuant to this Agreement shall be sent by registered or certified mail, courier service, or telefax addressed, in case of notice to Seller, to Vice President, Administration, Citation Marketing, The Cessna Aircraft Company, P.O. Box 7706, Wichita, Kansas 67277, Telefax No. 316/941-6640, and in case of notice to the Purchaser to the name and address appearing on page 1 of this Agreement, or such other address as the party to receive the notice from time to time shall designate in writing.

6. This Agreement is wholly integrated and is the sole agreement controlling this purchase and sale and is exclusive of any other express, implied, verbal, or written representations, omissions, or agreements, and is binding on Purchaser and Seller, their heirs, executors, administrators, successors or assigns. This Agreement, including the rights of Purchaser hereunder, may not be assigned by Purchaser except to a wholly-owned subsidiary or successor in interest by name change or otherwise and then only upon the prior written consent of Seller. Purchaser acknowledges receipt of a written copy of this Agreement which may not be modified in any way except by written agreement executed by authorized representatives of all parties.

7. If Seller is the prevailing party in legal proceedings to enforce Clause 3 (iii) or Clause 3 (v) of Section III hereof, then Seller shall be entitled to recover all expenses, including attorney's fees and costs.

Appendix E

8. If any portion of this Agreement is invalid or unenforceable, this Agreement shall be considered divisible as to such provisions and the remained of the Agreement valid and binding as though such provisions were not included herein.

9. Purchaser and Seller expressly agree to exclude from this Agreement the United Nations Convention on Contracts for the International Sale of Goods, 1980, and any successor thereto. This Agreement shall be governed in all respects and shall be construed, and the legal relationships between the parties shall be determined, in accordance with applicable commercial law of the State of Kansas, U.S.A., including, but not limited to, the Uniform Commercial Code, as the same may be enacted and in force from time to time in that jurisdiction, but unless Purchaser is an individual residing in the state of Kansas, the provisions of the Kansas Consumer Protection Act, K.S.A. 50-623, et. seq. as may be in effect from time to time, shall not apply to this Agreement or the parties hereto. This Agreement shall become a binding contract upon its final acceptance and execution by Seller Wichita, Kansas.

10. The Signatories to this Agreement verify that they have read the complete Agreement, understand its contents, and have full authority to bid and hereby do bind their respective parties.

PURCHASER	SELLER
NEWCO, INC.	The Cessna Aircraft Company
By: s/ illegible	By: s/ illegible
Title: President	Title: Vice President, Administration
Date: Aug. 30th 1994	Date: August 31, 1994

* *Purchaser reserves the right to the extra 100,000 sales allowance offered in the Citation Jet/Excel sales program in the event that Purchaser purchases the Citation Jet within 45 days.*